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IN THE

Supreme Court of the United States

October Term, 1950

No. ————————

MARY LARSEN, Special Administratrix of the Estate of Wayne E. Sanders, Deceased, Petitioner,

vs.

HONORABLE CARROL O. SWITZER, Judge of the United States District Court, Within and for the Southern District of Iowa, Davenport Division, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May It Please the Court:

The petition of Mary Larsen, special administratrix of the estate of Wayne E. Sanders, deceased, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This proceeding was brought by the petitioner in the United States Court of Appeals for the Eighth Circuit seeking a writ of mandamus commanding respondent to enter an order allowing and permitting petitioner to dis-

miss without prejudice, upon such terms and conditions as respondent deemed proper in the exercise of his judicial discretion, an action pending before respondent as Judge of the United States District Court for the Southern District of Iowa. In said action petitioner seeks to recover unliquidated damages from the Chicago and North Western Railway Company under the Federal Employers' Liability Act for the wrongful death of Wayne E. Sanders, said action originally having been commenced by petitioner in the United States District Court for the District of Minnesota. The Chicago and North Western Railway Company filed an answer, following which petitioner, as plaintiff in said action, noticed the taking of certain depositions. Defendant thereupon made a motion to transfer the action to the United States District Court for the Southern District of Iowa under Section 1404 (a) of the Judicial Code, which motion was granted by the United States District Court for the District of Minnesota. Thereafter petitioner herein moved the District Court for the District of Minnesota for a dismissal of her action without prejudice under Rule 41 (a) (2) of the Federal Rules of Civil Procedure, which motion was denied. Petitioner then brought mandamus proceedings in the United States Court of Appeals for the Eighth Circuit against the Honorable Gunnar H. Nordbye and Honorable Matthew M. Joyce, Judges of the United States District Court for the District of Minnesota, whereby she sought to compel respondents in that proceeding to enter an order dismissing the action without prejudice, fixing the terms and conditions therefor. The petition was denied. (*Larsen v. Nordbye,* 181 F. (2d) 765). Petitioner had not moved to vacate the order transferring the action to the Southern District of Iowa at the time the motion to dismiss without prejudice was made before the United

States District Court for the District of Minnesota. It was suggested by the Court of Appeals for the Eighth Circuit during the argument that the District Court for the Southern District of Iowa had probably acquired jurisdiction and that there was doubt as to whether respondents had jurisdiction to take any further action in said litigation, in view of the transfer order. Petitioner thereafter made a similar motion to dismiss without prejudice before the District Court for the Southern District of Iowa, which motion was denied, whereupon petitioner brought her second mandamus proceeding in the United States Court of Appeals for the Eighth Circuit, this time against the Honorable Carrol O. Switzer, Judge of the United States District for the Southern District of Iowa, to require Honorable Carrol O. Switzer to enter an order dismissing said action without prejudice and to fix the terms and conditions therefor. This petition for a writ of mandamus was denied by the United States Court of Appeals for the Eighth Circuit (No. 14,178, filed August 15, 1950).

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals, Eighth Circuit, on the first mandamus proceeding against Honorable Gunnar H. Nordbye and Honorable Matthew M. Joyce is reported in *Larsen v. Nordbye,* 181 F. (2d) 765. The opinion of the United States Court of Appeals, Eighth Circuit, on the second mandamus proceeding against Honorable Carrol O. Switzer and the subject matter of the petition herein for a writ of certiorari, is decision No. 14,178, filed August 15, 1950. This opinion is set forth in the record herein.

STATEMENT OF CASE

No testimony whatsoever has been adduced herein, and all pertinent facts are contained in the *Summary Statement of Matter Involved,* supra.

THE JURISDICTION OF THE UNITED STATES SUPREME COURT

The jurisdiction of this Court to review the decision of the United States Court of Appeals, Eighth Circuit, is invoked pursuant to Title 28, United States Code, Section 1254, effective September 1, 1948.

THE QUESTIONS PRESENTED

The principal questions presented by this application are as follows:

1. Whether petitioner, in view of the limited proceedings, had an unqualified right to dismiss her action without prejudice, with the only discretion vested in respondent being that of fixing the terms and conditions upon which such motion might be granted.

2. If so, whether a writ of mandamus commanding respondent to dismiss said action without prejudice should issue.

The first of these questions was decided adversely to the petitioner by the United States Court of Appeals, Eighth Circuit, by its decision that the unqualified right to dismiss without prejudice does not exist after the filing of an answer and that a motion to so dismiss is addressed to the judicial discretion of the trial court and therefore not properly the subject of a writ of mandamus, even though the trial court erred. By its adverse decision of the first of these two questions the United States Court of Appeals, Eighth Circuit, deemed it unnecessary to decide the second question.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A Conflict Exists Between the United States Court of Appeals, Seventh Circuit, and the United States Court of Appeals, Eighth Circuit, on the Questions Presented:

A. The United States Court of Appeals, Eighth Circuit, has decided that a plaintiff who has commenced an action in the United States District Court, by reason of Rule 41 (a) (2) of the Federal Rules of Civil Procedure, no longer has an absolute right to dismiss his case without prejudice after an answer has been filed. The United States Court of Appeals, Seventh Circuit, has decided that Rule 41 (a) (2) of the Federal Rules of Civil Procedure did not deprive a plaintiff bringing an action in the United States District Court from dismissing the same without prejudice after the answer has been filed, and that such an absolute right to dismissal still exists. See *Bolten v. General Motors Corp.*, 180 F. (2d) 379.

The United States Court of Appeals, Eighth Circuit, Fails to Follow the Decision of the United States Supreme Court:

B. By its decision herein the United States Court of Appeals, Eighth Circuit, leaves petitioner without a remedy to correct the action of respondent herein, save by appeal after trial, verdict and judgment. This is contrary to the procedure approved by the United States Supreme Court with reference to issuance of writ of mandamus in such a situation by its decision in the case of *In re Skinner & Eddy Corporation,* 265 U. S. 86, 44 S. Ct. 446.

PRAYER

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals, Eighth Circuit, commanding said Court to certify and send to this Court the transcript of the record in the case entitled "Mary Larsen, Special Administratrix of the Estate of Wayne E. Sanders, Deceased, Appellant, v. Honorable Carrol O. Switzer, Judge of the United States District Court, within and for the Southern District of Iowa, Davenport Division, Appellee, File No. 14,178," to the end that said cause may be reviewed and determined by this Court and the judgment of the lower courts be reversed.

MARY LARSEN, Special Administratrix of the Estate of Wayne E. Sanders, Deceased, Petitioner,

By IRVING H. GREEN,
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IN THE
SUPREME COURT OF THE UNITED STATES

No. ————————

MARY LARSEN, Special Administratrix of the Estate of Wayne E. Sanders, Deceased, Petitioner,

vs.

HONORABLE CARROL O. SWITZER, Judge of the United States District Court, within and for the Southern District of Iowa, Davenport Division, Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF CASE

No testimony has been taken in any of the proceedings herein involved. The origin and history of the case have been sufficiently covered in the petition, and in the interests of brevity will not be repeated here.

Petitioner relies upon the ancient and absolute right to a dismissal without prejudice historically and traditionally granted to plaintiffs, and contends that Rule 41 (a) (2) has not destroyed or abolished such right but simply provides a requirement for a court order for such dismissal so that the court may fix proper terms and conditions to protect defendants from abuse of process. The Circuit Court of Appeals, Eighth Circuit, squarely holds that such a right no longer exists in view of Rule 41 (a) (2) of the Federal Rules of Civil Procedure.

Specifications of Errors to Be Urged.

The United States Court of Appeals for the Eighth Circuit erred:

1. In holding that petitioner did not have an absolute right to a dismissal of her action without prejudice, in view of the limited proceedings had at the time her motion was heard by respondent.

2. In holding that no mandamus should issue, even though respondent's ruling in refusing to grant such dismissal was erroneous.

ARGUMENT

I.

The United States Court of Appeals, Eighth Circuit, Erred in Holding That Petitioner Did Not Have an Absolute and Unqualified Right to a Dismissal Without Prejudice, Under the Circumstances of the Case and in View of the Limited Proceedings Which Had Transpired at the Time Her Motion Was Addressed to Respondent.

The sole question is whether petitioner was and is entitled to a dismissal of her action without prejudice. After respondent's refusal to grant such dismissal, petitioner had no other effective or plausible course of procedure other than to seek a writ of mandamus compelling respondent to grant the dismissal.

Prior to the promulgation of Rule 41 (a) (2) a plaintiff's right to dismiss without prejudice before trial was unquestioned. Since the promulgation of Rule 41 (a) (2) a plaintiff's right to dismiss without prejudice has, on occasion, been questioned, but the issues have been clouded and confused because, in the cases involved, the question has been the propriety of the terms and condi-

tions imposed, rather than whether or not the plaintiff involved had an absolute right to a dismissal without prejudice. See *Federal Savings & Loan Insurance Corporation v. Reeves, Dist. Judge,* 148 F. (2d) 731; *Home Owner's Loan Corporation v. Huffman,* 134 F. (2d) 314; *Hydraulic Press Mfg. Co. v. Williams, White & Co.,* 165 F. (2d) 489. Here petitioner has offered to pay the reasonable costs of the defendant and requested respondent herein to determine such costs and condition the dismissal without prejudice upon payment thereof. Instead, respondent refused to dismiss the cause under any terms and conditions.

It is the position of petitioner that in view of the limited proceedings had in the cause to date, respondent had no discretion and was compelled to grant said motion, his only discretion being as to the terms and conditions that he might impose.

The decision of the United States Court of Appeals for the Seventh Circuit in *Bolten v. General Motors Corp.,* 180 F. (2d) 379, is directly in point on the question of petitioner's absolute right to the dismissal sought. Although that case arose on appeal rather than by petition for a writ of mandamus, the holding of the Court is directly in point upon the question herein involved. In the *Bolten* case the plaintiff had instituted his action in the United States District Court for the Northern District of Illinois, Eastern Division, seeking damages for personal injuries sustained in an accident which occurred near Kansas City, Missouri. The action was commenced more than two years after the date of the accident and was, therefore, barred by the Illinois Statute of Limitations. It was not barred, however, by the Missouri Statute of Limitations and could have been commenced in the Federal Court in Missouri. Defendant's answer set up

the defense of the Illinois Statute of Limitations and a motion for summary judgment on that ground was filed. Plaintiff thereupon sought to dismiss without prejudice, which motion was denied and summary judgment for the defendant entered on the sole ground that plaintiff's cause of action was barred by the two-year Statute of Limitations of Illinois. Plaintiff thereupon appealed to the Court of Appeals for the Seventh Circuit, the order was reversed, and the cause remanded, with directions to the lower court that the order be vacated and an order entered permitting the plaintiff to dismiss his complaint without prejudice upon terms and conditions. In an unanimous opinion the Court held that plaintiff had an absolute right to dismiss under Rule 41 (a) (2), restricted only by the requirement that it be done on order of the Court and upon such terms and conditions as the Court deemed proper. We quote extensively from this opinion, because we consider it a correct expression of the law and on the rights of the petitioner herein to the dismissal sought:

> "Rule 41 of the Rules of Civil Procedure, 28 U. S. C. A., concerning dismissal of actions provides:
>
> "'(a) Voluntary Dismissal: Effect Thereof.
>
> "'(1) By Plaintiff; by Stipulation, or before service of answer or motion for summary judgment.
>
> "'(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.'
>
> "As already indicated, there is nothing in the opinion of the lower court or in the order appealed from which indicates what, if any, consideration was given to this rule. Obviously, plaintiff could not dismiss without an order of court under (a) (1), inasmuch as his motion was made subsequent to defendant's answer and motion for summary judgment.

Plaintiff contends, however, that he had a right under (a) (2) to dismiss without prejudice 'upon such terms and conditions as the court deems proper,' but that in any event the denial of his motion to dismiss without prejudice was an abuse of discretion. There is authority for plaintiff's contention that he was entitled to dismiss as a matter of right upon complying with such terms and conditions as the court might order. This court, in Hydraulic Press Mfg. Co. v. Williams, White & Co. (7th Cir.), 165 F. (2d) 489, 495, stated as to Rule 41 (a) (2), 'The effect of this rule was to confer upon the court in all civil actions the equitable power to impose upon a plaintiff seeking to dismiss without prejudice "such terms and conditions as the court deems proper",' citing Home Owners' Loan Corporation v. Huffman (8th Cir.), 134 F. (2d) 314. In this latter case the court gave extended consideration to the meaning and requirements of the rule under discussion. 134 F. (2d) on page 316, the court stated:

" 'The rule has long prevailed in both law and equity that a plaintiff may dismiss his case without prejudice only by payment of the costs and when the defendant will not be subjected thereby to some plain legal prejudice beyond the incidental annoyance (as distinguished from prejudice) of a second litigation upon the same subject matter (citing many cases).

" 'Since rule 41 is declaratory of a long established practice in the courts and is intended only to clarify and make definite that practice, it should be construed with reference to the precedents.'

"And the court on the same page further stated: 'Upon a plaintiff's motion to dismiss without prejudice the equities of the plaintiff are not a subject for consideration under the rule. The terms and conditions which the court may impose are for the protection of the rights of the defendant' (citing cases).

"(1, 2) *In our view, the absolute right of a plaintiff to dismiss under (a) (2) is restricted only by the requirement that it be done 'upon order of the court and upon such terms and conditions as the court deems proper.' The discretion of which the authori-*

ties speak, and sometimes confusingly, is as to the 'terms and conditions' rather than to the right of the plaintiff to have such 'terms and conditions' fixed and to dismiss without prejudice upon compliance therewith. See Peardon v. Chapman, et al. (3rd Cir.), 169 F. (2d) 909, 913. We think this interpretation is consistent with the purpose of the rule, that is, to protect the rights of the defendant. Of course, it is not difficult to visualize a situation where the defendant in the course of a proceeding has acquired such legal rights of a substantive nature that it could not be adequately protected by any 'terms and conditions' which the court might impose as a prerequisite to the right of the plaintiff to dismiss, but we are not now confronted with such a situation.

"(3) The only pleadings filed by the defendant were its answer to the complaint and the motion for summary judgment and, as noted, the latter was allowed solely on the ground of the two-year Illinois limitation period. The adjudication on this issue had nothing to do with the merits of the case and meant nothing more than that the action could not proceed in the Illinois jurisdiction. Titus et ux. v. Wells Fargo Bank & Union Trust Co. (5th Cir.), 134 F. (2d) 223, 224. And while the defendant by the allowance of plaintiff's motion may be subjected to the annoyance and expense of a suit on the merits, it will not suffer any legal prejudice.

"It is, therefore, our conclusion that the court erred in denying plaintiff's motion to dismiss without fixing such 'terms and conditions' as it deems proper as a prerequisite to such dismissal.

"In view of what we have said, there is no occasion to consider the effect which the order appealed from might have when and if a suit is commenced in the Missouri jurisdiction. Neither do we see any reason to decide whether plaintiff's settlement with his employer under the Missouri Workmen's Compensation Act constitutes a bar to an action against the defendant. That question may be more appropriately determined by the Missouri court if and when the occasion arises.

> "The order appealed from is reversed and the cause remanded, with directions that it be vacated and an order entered permitting the plaintiff to dismiss his complaint without prejudice 'upon such terms and conditions as the court deems proper.' " (Italics ours.)

This holding of the United States Court of Appeals for the Seventh Circuit as to plaintiff's absolute right to a dismissal is in direct conflict with the decision herein by the United States Court of Appeals for the Eighth Circuit, which is the subject of this petition for a writ of certiorari. The *Bolten* decision also is at variance with certain language of the majority opinion of the United States Court of Appeals, Eighth Circuit, in *Federal Savings & Loan Insurance Corporation v. Reeves,* supra, and with certain of the language of the Court of Appeals for the Eighth Circuit in *Home Owner's Loan Corporation v. Huffman,* supra. The unanimous opinion in the *Bolten* case is in accord with the views expressed by Judge Woodrough of the Court of Appeals for the Eighth Circuit in his dissenting opinion in *Federal Savings & Loan Insurance Corporation v. Reeves,* supra. His views on this subject, in so far as they are applicable here, are as follows:

> "The question is of far-reaching importance. The right of plaintiff to dismiss without prejudice before trial is a peculiar one which has persisted a very long time and survived many codifications and attacks. It has endured as a refuge for the weak in the hour of their confrontation with the ordeal of trial. The right is in essence of the same nature as the right of trial by jury. Both are practical means, from wisdom and experience, tending to palliate inequality of position between litigants.
>
> "Certainly there is nothing in the rule declaring that the traditional right of plaintiffs to dismiss without prejudice before trial shall be abolished.

> Whether such a long-cherished right of plaintiffs could be substantially impaired by mere rules of court need not be gone into. It is clear the rule-makers recognized the right as continuing and had no thought to abrogate it."

Actually, in the *Reeves* case the dismissal sought was granted and the question for decision was whether or not the District Court had imposed proper terms and conditions. It, therefore, should not be considered authority for the contention that the granting or refusing of petitioner's motion for dismissal without prejudice is discretionary with the Court. In the *Reeves* case, the question was not whether or not plaintiff should have a dismissal, but what the terms and conditions should be. So, too, to some extent, is the same true of the *Huffman* case. That case arose on an appeal taken by the *defendant* from an order allowing plaintiff to dismiss without prejudice. And, in fact, the decision in the *Huffman* case was not that the dismissal should have been refused, but that it should have been granted only if conditioned upon reasonable terms, namely, the payment of costs. In other words, in both the *Huffman* and *Reeves* cases, the plaintiff secured his dismissal without prejudice from the District Court, and in both cases it was the decision of the Court of Appeals for the Eighth Circuit that such dismissal was proper in so far as the right to dismiss was concerned. The question decided by the Court in both of those cases was with regard to what would be proper terms and conditions under Rule 41 (2). It is only in the *Bolten* case that the question of plaintiff's right to dismiss without prejudice was decided, because only in the *Bolten* case was plaintiff's motion to dismiss without prejudice denied, and this denial, by a unanimous decision of the Seventh Circuit, was held improper. The *Bolten* case squarely holds that there is no discretion;

that the court must make an order of dismissal without prejudice on plaintiff's motion and that the only discretion is as to terms and conditions.

If the well reasoned opinion and holding of the *Bolten* case is accepted as a correct interpretation of the effect of Rule 41 (a) (2), then unquestionably, under the facts of the limited proceedings had herein, respondent had no discretion in the matter other than the fixing of the terms and conditions. Petitioner has no effective remedy other than proceedings in mandamus, and has no other way in which to protect her rights than to have this Court direct the Court of Appeals for the Eighth Circuit to compel respondent to permit the dismissal to which petitioner is obviously entitled.

II.

The Correction of the Errors Committed Below Will Establish Sound Principles for Future Guidance of the Various United States Courts of Appeal, the United States District Judges, Attorneys-at-Law and Litigants on the Question Herein Involved.

We appreciate that appellate courts are reluctant to mandamus judges of lower courts. However, we submit that this is a situation where petitioner's rights can only be protected by the issuance of the writ of mandamus. *In re Skinner & Eddy Corporation,* 265 U. S. 86, 44 S. Ct. 446, is adequate authority for the issuance of a writ of mandamus to correct the unauthoized action of respondent herein. That *In re Skinner & Eddy Corporation,* supra, was decided before the promulgation of Rule 41 (a) (2) seems to us unimportant. The principles expressed therein remain applicable today. We refer particularly to that portion of the opinion which deals with the question of whether or not the extraordinary process

of mandamus should be resorted to, or whether it would be more proper for the case to proceed to trial and then have the question presented on appeal rather than mandamus. In this connection, a portion of the opinion of Chief Justice Taft in the *Skinner & Eddy Corporation* case is highly important:

> "It only remains to inquire whether this is a proper case for the writ asked. Mandamus is an extraordinary remedial process, which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles. Duncan Townsite Co. v. Lane, 245 U. S. 308, 312, 38 Sup. Ct. 99, 62 L. Ed. 309; Arant v. Lane, 249 U. S. 367, 371, 39 Sup. Ct. 293, 63 L. Ed. 650. *It would be a useless waste of time and effort to enforce a trial in the Court of Claims, if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition,* as we should have to do for the reasons stated." (Italics ours.)

In re Skinner & Eddy Corporation, supra, is important also for the principles expressed as to a plaintiff's right to dismiss without prejudice. We consider this true even though that case was decided long before the enactment of Rule 41 (a) (2), as the rule was merely an expression of existing rights, and did not add to the authority of District Judges other than to fix the terms and conditions.

Moreover, the exception to the proposition that petitioner has an absolute right to a dismissal without prejudice is not present here. That exception is limited to situations where a dismissal would prejudice the defendant in some substantial way; where defendant in the course of the proceedings had acquired legal rights of a substantial nature which could not adequately be pro-

tected by any terms and conditions which the Court might impose. As the court said in the *Bolten* case: "We are not now confronted by such a situation," and as the court said in the *Skinner* case: "We do not perceive anything in the circumstances of this case which would be grounds for making this situation an exception to the general rule that a plaintiff has an absolute right to a dismissal without prejudice." Most certainly the defendant in the *Bolten* case had acquired legal rights of a more substantial nature than the North Western railroad has acquired here. In *Bolten,* the defendant would have had absolute and final judgment in its favor had the denial of dismissal been upheld.

The court in the *Skinner* case recognized the exception, and nevertheless held that mandamus proceedings were proper. In other words, the fact that there is an exception to the absolute right to dismissal does not make the matter one of judicial discretion. If the circumstances are such, as they are here, that a dismissal is a matter of right, then respondent had no discretion, and it is not a question of abuse of judicial discretion but one of respondent's having acted without lawful authority in his refusal to grant petitioner's motion. There is a difference between judicial discretion and judicial decision, though the two are sometimes confused. In this case, we submit that respondent exceeded his lawful authority by his action herein, and that excess of authority can only be corrected by the issuance of a writ of mandamus. *In re Skinner & Eddy Corporation,* supra.

It is understandable that respondent and the United States Court of Appeals for the Eighth Circuit could misinterpret the intention of Rule 41 (a) (2) because of the language used by some courts in interpreting it. A clear interpretation by the Supreme Court of the United

States, such as enunciated by the Court of Appeals, Seventh Circuit, in the *Bolten* case, would be of great assistance to the lower courts. The ruling applied for here by this petitioner is of sufficient importance to transcend the immediate interests of the parties to this action. In Anglo-American courts plaintiffs traditionally have had the absolute right to dismiss an action prior to trial. The obvious purpose of Rule 41 (a) (2) of the Federal Rules of Civil Procedure was not to abolish this right, but simply to provide a requirement for a court order for the dismissal so that the court could control the situation in the fixing of terms and conditions for the dismissal, thereby protecting defendants from any abuse of process. Rule 41 (a) (2) should not be interpreted as an instrument to destroy the absolute right of a plaintiff to dismiss before trial.

If the decision below of the Court of Appeals for the Eighth Circuit be upheld, then a litigant plaintiff must file his suit in Federal Court at the peril of being forced to continue his action once he commenced it, even though he wishes to discontinue it and pay the costs and expenses of the defendant. Under the decision below, if the trial court refuses to dismiss an action a plaintiff has no remedy except to proceed with the trial of the case and then appeal from the order denying his motion to dismiss. It is inconceivable to us that the Supreme Court of the United States intended such a result when it adopted Rule 41 (a) (2), particularly in view of its decision and language in *In re Skinner & Eddy Corporation,* supra.

CONCLUSION

It is respectfully submitted that the question here involved is one of vital interest to the public, attorneys-at-law, and the lower Federal Courts. The correct interpretation of Rule 41 (a) (2) should be determined. The rights to be decided here are basic and important for the reasons heretofore advanced that upon the authorities expressed in this brief it is respectfully submitted that the petitioner is entitled to have her case submitted to this Court for a decision upon correct principles of law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1950

No. 374

MARY LARSEN, Special Administratrix of the Estate of Wayne E. Sanders, Deceased, Petitioner,

vs.

HONORABLE CARROL O. SWITZER, Judge of the United States District Court Within and for the Southern District of Iowa, Davenport Division, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner seeks certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in *Larsen v. Switzer,* 183 F. (2d) 850, which denied her application for a writ of mandamus directing respondent to vacate his order denying and to grant the motion of the plaintiff (petitioner) under Rule 41 (a) (2), Federal Rules of Civil Procedure, to dismiss, without prejudice, an action pending in the United States District Court, Southern District of Iowa, Davenport Division.

The action, brought against Chicago and North Western Railway Company under the Federal Employers' Liability Act to recover damages for the death of the plaintiff's decedent, was started in the United States District Court, District of Minnesota, Fourth Division, and later transferred to the Southern District of Iowa, Davenport Division, "for the convenience of parties and witnesses, in the interest of justice," on motion of the Railway Company under Section 1404 (a), Judicial Code (28 U. S. C. A., Sec. 1404 (a)). Petitioner's motion to dismiss the action without prejudice was made after service of the defendant's answer (R. pp. 2-6, *Larsen v. Nordbye,* 181 F. (2d) 765, C. C. A. 8).

REASONS URGED IN SUPPORT OF PETITION NOT TENABLE

Reasons Urged.

Petitioner contends that this court should grant certiorari and review the decision of the Court of Appeals for the reasons that such decision is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Bolten v. General Motors Corp.,* 180 F. (2d) 379, and with this court's decision in *In re Skinner & Eddy Corporation,* 265 U. S. 86.

Decision Sought to Be Reviewed.

In *Larsen v. Switzer,* 183 F. (2d) 850, the Court of Appeals for the Eighth Circuit decided *one* question. It held that it could review the ruling of the trial court on a motion under Rule 41 (a) (2) to dismiss an action, without prejudice, *only* on appeal from a final order or judgment and not through the medium of a writ of mandamus. The Court of Appeals did not pass on the correctness of the

ruling on the motion to dismiss nor whether respondent abused a judicial discretion in declining to dismiss the action.

No Conflict between Circuit Courts of Appeal on the Same Matter or Issue.

Bolten v. General Motors Corp., 180 F. (2d) 379 (C. C. A. 7), involved an appeal from a final judgment. The trial court had denied the plaintiff's motion to dismiss, without prejudice, and granted the defendant's motion for summary judgment. The Court of Appeals reversed the judgment, holding, that under the circumstances there present, it was error to overrule the motion to dismiss and that the trial court should have allowed a dismissal without prejudice upon appropriate terms and conditions.

Whether mandamus is a proper remedy to secure a review of an order denying or granting a motion to dismiss, without prejudice, under Rule 41 (a) (2), was not at issue nor decided in the *Bolten* case. Hence, there is no conflict on the same matter between the decision here sought to be reviewed and the decision in the *Bolten* case. Later it will be made apparent that the *Bolten* decision *obiter dicta* views respecting trial court discretion in ruling on a motion to dismiss are erroneous.

No Conflict With Skinner & Eddy Corporation Decision.

Ex parte Skinner & Eddy Corporation, 265 U. S. 86, was decided before the adoption of the Federal Rules of Civil Procedure. In that case a writ of mandamus properly issued to prevent the Court of Claims from exercising jurisdiction, contrary to statute, over a suit which it had previously dismissed. In the instant case the trial court possessed and exercised jurisdiction to rule on the motion of the plaintiff (petitioner), under Rule 41 (a) (2), to dismiss the action without prejudice. The distinctions which avoid any conflict between the decision in *Ex parte Skinner & Eddy Corporation* and the decision in *Larsen v. Switzer,* 183 F. (2d) 850 (C. C. A. 8) are pointed out in *Federal Savings & Loan Ins. Corporation v. Reeves,* 148 F. (2d) 731, 732 (C. C. A. 8).

Judicial Discretion of Respondent May Not Be Controlled or Reviewed by Mandamus.

The traditional use of the writ of mandamus is to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche v. Evaporated Milk Association,* 319 U. S. 21, 28-32. Here it must be conceded that the trial court had jurisdiction to rule on a motion to dismiss under Rule 41 (a) (2) and that such jurisdiction was exercised upon motion of the plaintiff. Therefore a writ of mandamus is not necessary either to confine the trial court to a lawful exercise of its jurisdiction or to compel it to exercise jurisdiction.

A statutory mode of appeal has been prescribed and is available to petitioner once an appealable order or judgment is entered in the case. (28 U. S. C. A., Secs. 1291 and

2107, Rule 73, Federal Rules of Civil Procedure.) Compare *Ex parte Whitney,* 13 Peters 404, 408; *Ex parte Loring,* 94 U. S. 418, and *Ex parte Perry,* 102 U. S. 183, 186, holding that mandamus may not be substituted for an appeal to correct an order made by a judge in the exercise of his authorized jurisdiction.

In *Federal Savings & Loan Ins. Corporation v. Reeves,* 148 F. (2d) 731, 732, the plaintiff applied to the Court of Appeals for the Eighth Circuit for a writ of mandamus directing the trial court to vacate an order denying its motion to dismiss, without prejudice, and to enter an order granting such motion. In holding that the trial court exercises a judicial discretion in ruling on a motion to dismiss under Rule 41 (a) (2) and that such discretion cannot be controlled by mandamus, the appellate court stated:

> "It is elementary that mandamus cannot be used to control the lawful discretion of a trial court * * *; nor to compel a trial court to reverse a decision which it has rendered on a question within its jurisdiction. * * * The writ may not be employed as a substitute for appeal. It is properly denied where the remedy by appeal is available, as it is here, in the event of a final judgment against petitioner in the District Court."

The *Reeves* decision is well reasoned and logical and disposes of *Ex parte Skinner & Eddy Corporation,* 265 U. S. 86, as a controlling precedent, in this language:

> "Ex parte Skinner & Eddy Corporation was decided before the adoption of the Federal Rules of Civil Procedure and at a time when a plaintiff had the absolute right to dismiss without prejudice upon the payment of the accrued costs, and, hence is not controlling here. The real ground for the issue of the writ in that case was to prevent 'the Court of Claims from exercising jurisdiction contrary to statute, over a suit which it had previously dismissed.' "

The Court of Appeals for the Eighth Circuit has held consistently that a trial court exercises a judicial discretion in ruling on a motion to dismiss an action, without prejudice, under Rule 41 (a) (2). *International Shoe Co. v. Cool,* 154 F. (2d) 778 (cert. denied 329 U. S. 726); *Sound Investment & Realty Co. v. Harper,* 178 F. (2d) 274; *Larsen v. Nordbye,* 181 F. (2d) 765, and *New York C. & St. L. R. Co. v. Vardaman,* 181 F. (2d) 769.

By analogy the decision in *Cone v. West Virginia Pulp & Paper Co.,* 330 U. S. 212, 217, 218, is persuasive. There this court directly construed Rule 50 (b), Federal Rules of Civil Procedure, to the effect that in ruling on a motion for judgment notwithstanding a verdict, a trial court, in its discretion, may grant the motion, order a new trial or *on motion allow a dismissal without prejudice.* This quotation from the *Cone* decision is interesting and pertinent:

> "Rule 41 (a) (1) preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And *after* the *filing of an answer, Rule 41 (a) (2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as the court deems proper.'* * * * In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, *or at least asked the court for permission to dismiss.* If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion. The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge *in order that he might exercise his discretionary power to determine whether there should be* a judgment, *a dismissal* or a new trial." (Italics supplied.)

Respondent was the judicial officer to whose judgment and discretion the law had entrusted the question whether the motion to dismiss, without prejudice, should be granted and, if so, on what terms and conditions. The Court of Appeals for the Eighth Circuit correctly held that it had no power by writ of mandamus to direct the respondent how and in whose favor the motion should be decided. Such action would result in the unwarranted substitution of the judgment and discretion of the appellate court for that of the judicial officer (the respondent) to whom the law had entrusted the decision of the issue. For similar reasons the appellate court, under its discretionary power to issue writs of mandamus, had no authority to compel respondent to reverse a decision already rendered, to correct an erroneous conclusion or to render another and different decision. *Larsen v. Nordbye,* 181 F. (2d) 765, 766 (C. C. A. 8). Even where permissible, resort to the extraordinary remedy of mandamus is discretionary. *Roche v. Evaporated Milk Association,* 319 U. S. 21.

Bolten Decision Respecting Trial Court Discretion Dictum and Incorrect Statement of Law.

Although not necessary to the decision in the case and in fact contrary to the doctrine of the cases cited to support the statement (*Home Owners Loan Corporation v. Huffman,* 134 F. (2d) 314 (C. C. A. 8); *Hydraulic Press Mfg. Co. v. Williams, White & Co.,* 165 F. (2d) 489 (C. C. A. 7), and *Peardon v. Chapman,* 169 F. (2d) 909 (C. C. A. 3)) in the *Bolten* decision (180 F. (2d) 379, 381, 382), the Court of Appeals for the Seventh Circuit, expressed the view that unless, in the course of the proceedings, a defendant "has acquired such legal rights * * * that it could not be adequately protected by any 'terms and conditions'

which the court might impose as a prerequisite" to dismissal, the plaintiff, even after answer, has an absolute right to dismiss the suit without prejudice, the trial court's discretion in ruling on a motion under Rule 41 (a) (2) being limited to fixing "terms and conditions," such as payment of costs.

In the *Huffman, Hydraulic Press* and *Peardon* cases the error specified was raised by an appeal from a final judgment and none of the decisions support the contention that, in ruling on a motion under Rule 41 (a) (2), trial court discretion is limited to the imposition of "terms and conditions," such as a requirement for payment of costs. For example, in the *Huffman decision* (134 F. (2d) 314, 318, 319), the Court of Appeals for the Eighth Circuit states:

> "Under Rule 41 a plaintiff does not have an absolute right to dismiss his case without prejudice after an answer has been served."

In the *Hydraulic Press* case (165 F. (2d) 489, 495) the judgment appealed from dismissed certain counts of the complaint *with prejudice* contrary to plaintiff's motion that they be dismissed *without prejudice.* In sustaining the judgment, the Court of Appeals for the Seventh Circuit used this language:

> "The effect of this rule (41 (a) (2)) was to confer upon the court in all civil actions the equitable power to impose upon a plaintiff seeking to dismiss without prejudice 'such terms and conditions as the court deems proper.' * * * We think it was a matter of discretion. We cannot say the court abused its discretion."

If in ruling on a motion to dismiss *without prejudice* a trial court has discretion to require, as a condition to dismissal, that it be *with prejudice,* then certainly it has discretion to determine whether, under all of the circum-

stances, it would be equitable and proper to grant the motion.

In the *Peardon* case (169 F. (2d) 909, 913) the Court of Appeals for the Third Circuit held that in ruling on a motion, under Rule 41 (b), to dismiss an action for lack of prosecution, the trial court exercises a judicial discretion and "* * * the action of a trial judge in such circumstances is therefore reversible only when an abuse of discretion is shown."

It is evident that the *obiter dicta* views of the Court of Appeals for the Seventh Circuit in the *Bolten* decision were not justified by the authorities cited and are contrary to well reasoned authorities, including, by analogy, the decision of this court in *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212. Further, if it be assumed, as is suggested in the *Bolten* decision, that in ruling on a motion to dismiss, without prejudice, under Rule 41 (a) (2), trial court discretion is confined to a determination of the legal rights acquired in the proceeding by the defendant and whether such rights can be adequately protected by "terms and conditions" and of the appropriate terms and conditions that should be imposed as a prerequisite to dismissal without prejudice, then from a consideration of the authorities cited and discussed, it is clear that the exercise of even such limited discretion may not be controlled or reviewed by mandamus.

CONCLUSION

The petition for a writ of certiorari should be denied. The Court of Appeals decision is correct. There is no conflict on the same matter between United States Courts of Appeals or between the decision of the Court of Appeals for the Eighth Circuit sought to be reviewed and the decision of this court in *Ex parte Skinner & Eddy Corporation,* supra.

Respectfully submitted,

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